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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

50530

**FILE:** B-182636

**DATE:** February 12, 1975

**MATTER OF:** Non-Linear Systems Inc.

**DIGEST:**

1. In the absence of probative evidence of a conscious or deliberate intention to impede the participation of a prospective bidder, advertisement in the Commerce Business Daily and existence of competition require conclusion that protester's failure to receive a copy of solicitation is a mere inadvertence and not remediable.
2. Publication of proposed procurement in Commerce Business Daily (CBD) should be regarded as constituting notice of such information within the meaning of the requirements of 4 C.F.R. 20.2(a) for filing protests. Even though protest was filed more than 30 days after notice in the CBD matter was not dismissed as untimely since protester seemed to allege an express commitment was made by Navy to solicit the firm and there was a possibility the firm may have been misled.
3. Award made pending resolution of protest by GAO is proper since there was urgent need for items.
4. Insofar as protester's rebuttal to administrative report raises new issues concerning the adequacy of the specification and the responsiveness of the successful offeror's standard equipment, it is contrary to intent of protest standards to permit such arguments to be raised for first time so late in the protest process.

The Navy Ships Parts Control Center (SPCC), Mechanicsburg, Pennsylvania, issued request for proposals N00104-75-R-TA84, on September 20, 1974, for a quantity of digital multimeters, ancillary data and literature. Non-Linear Systems Inc., was not solicited and the concern protested this fact.

The reasons stated by Non-Linear as to why it should have been solicited are that (1) it participated in two prior formal competitions for the item; (2) it submitted two unsolicited proposals to the Navy Electronics System Command (NAVELEX) which showed a possible significant savings for the item; (3) it cooperated with a NAVELEX evaluation program by submitting three instruments for testing, which would imply

the existence of a commitment by NAVELEX to include Non-Linear in the subject competition; (4) it is the most experienced supplier of the item in the world and (5) it is a small business in an area of substantial unemployment.

The Navy reports that it has found no record of any request by Non-Linear to the procuring activity, SPCC, that it be included on the bidders list. The original list for this procurement included 13 sources and as a result of the synopsis in the Commerce Business Daily another 12 sources requested copies of the solicitation. Navy denies that Non-Linear was identified to SPCC as a recommended source.

It is apparent that the protester dealt with NAVELEX, a command which provided engineering and technical support to the procuring activity. NAVELEX states it regarded Non-Linear's unsolicited proposal as informational. This was the understanding obtained from a telephone conversation with Non-Linear's general manager. The proposals were forwarded to the Navy Electronics Supply Office, which was phased out in June 1974 and was succeeded by SPCC. The report states that NAVELEX actually advised Non-Linear to contact SPCC to arrange for inclusion of its name on the bidders list. Non-Linear apparently misunderstood this suggestion since NAVELEX contends there was no commitment to include the concern as a recommended bidder. In addition, the instruments which Non-Linear submitted for testing were evaluated as part of NAVELEX' program for standardization of multimeters. In this connection the record does not show that the procuring activity possessed any information which would have caused Non-Linear to be added to the bidders list.

As a general proposition, we have held that the propriety of a particular procurement must be determined from the Government's point of view upon the basis of whether adequate competition and reasonable prices were obtained, not upon whether every possible prospective bidder was afforded an opportunity to bid. 50 Comp. Gen. 565, 571 (1971). In the absence of probative evidence of a conscious or deliberate intention to impede the participation of a prospective bidder, the failure to receive a copy of the solicitation must be viewed as an inadvertency which generally does not constitute a sufficient basis to cancel an invitation or to question an otherwise proper award under an invitation. 49 Comp. Gen. 707, 709 (1970). In our opinion the circumstances of the present case, particularly the advertisement in the Commerce Business Daily, and the existence of competition for the requirement, lead us to believe that the failure to solicit Non-Linear was a mere inadvertency. While Non-Linear has

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by letter received here on January 20, 1975, presented additional arguments to rebut the Navy's report and to support its basic position that the procuring activity was remiss in overlooking Non-Linear as a potential source of supply, we remain convinced that the failure to solicit in this case was a mere inadvertency and is not remediable at this time.

We are aware that this protest was filed well over a month after notice of the procurement was published in the Commerce Business Daily and more than 2 weeks after the closing date for receipt of proposals. Our Interim Bid Protest Procedures and Standards, 4 C.F.R. 20.2(a) provides in part that protests should be filed not later than 5 days after the basis for protest is known or should have been known. In a recent decision concerning the agency's failure to solicit a protester we held that the basis of the protest should have been known to the protester within the meaning of 4 C.F.R. 20.2(a), when notice of award was published in the Commerce Business Daily. Del Norte Technology, Inc., B-182318, January 27, 1975. Similarly, we think publication of the proposed procurement should be regarded as constituting notice of such information to all concerned. Otherwise protests such as the instant one could be filed at any time after award, contrary to the intent of our protest standards. In the present case, however, the matter was fully developed and considered on its merits prior to the development of the above rationale regarding the timeliness of such protests. For this reason, together with the fact that the protester initially seemed to contend that there was an express commitment by NAVELEX to solicit the firm which, if true, may have misled the protester, we have treated the substance of this protest rather than summarily dismiss it as untimely filed.


Non-Linear also objects to the fact that Navy awarded a contract on November 21, 1974, prior to our resolution of its protest. The Navy proceeded with the award since Non-Linear had not submitted a proposal, since its protest was after the closing date for receipt of proposals and since the item was a high priority item urgently required for fleet use. Armed Services Procurement Regulation 2-407.8(b)(3) (1974 ed.) provides, in part, that award may be made notwithstanding the existence of a protest if the items to be procured are urgently required. Since there was an urgent need for the items in this case the award action pending resolution of the protest was proper. 48 Comp. Gen. 230, 232 (1968). In this connection Non-Linear has requested, by letter dated January 30, 1975, that this Office secure a detailed explanation regarding the Navy's urgency determination. However, we do not believe it is necessary to pursue this matter at the present time since we are satisfied on the merits of the case that the procuring activity did not commit itself to solicit Non-Linear and that the failure to solicit the firm was a mere inadvertency.

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Finally, Non-Linear's rebuttal to the administrative report, which was received here on January 20, 1975, raises additional issues such as the adequacy of the specification and the nonresponsiveness of the brand name offeror's standard equipment. To the extent arguments made in the rebuttal letter pertain to issues timely raised, they have been considered. However, we consider untimely the above-mentioned additional points. We believe it is clearly contrary to the intent of our protest standards to permit such arguments to be raised for the first time this late in the protest process. 4 C.F.R. 20.2.

Accordingly, the protest is denied.

Acting

  
Comptroller General  
of the United States